In the

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of BEN F. MASON, *Appellant*, v. JOHN R. CRANOR, Superintendent of Washington State Penitentiary at Walla Walla, Washington, *Appellee*.	No. 14597

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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JURISDICTION

The appellee accepts the jurisdictional statement of the appellant.

COUNTER STATEMENT OF THE CASE

On June 21, 1939, the appellant herein was convicted, sentenced and committed to the Washington state penitentiary at Walla Walla, Washington,

following a plea of guilty to the crime of grand larceny in King County Cause No. 20096 and was subsequently sentenced to a term of not more than fifteen years in said penitentiary. On July 13, 1949, the parole board, pursuant to statute, granted to the said appellant a parole and at the same time issued to said appellant a discharge from supervision (Tr. 90). Said parole, which was accepted by appellant herein, had certain conditions with which the appellant had to comply, the basic condition being his good conduct (Tr. 90, 91). On September 27, 1949, the Board of Prison Terms and Paroles was advised by the prosecuting attorney of Klickitat County, Goldendale, Washington, that they were interested in the whereabouts of the appellant because an NSF check had been passed in that community, to which appellant had affixed his signature. The check was returned by the bank with the notation "account closed" (Tr. 91). [It will be noticed that subsequently, during the course of the criminal proceedings in Spokane resulting in a conviction from which this habeas corpus proceedings stems, Mr. Mason in testifying, denied that he had ever issued a check in Goldendale and it was only after some time and a check to which his signature was affixed had been admitted into evidence that Mr. Mason conceded that he had written the check, saying that the day before he had not recalled writing it (Resp. Exh. 1).] Because the check had been written, which was a violation of the

Board of Prison Terms and Paroles act of the state of Washington, the parole officer of the board in Seattle issued a memorandum to all district parole officers concerning appellant, requesting that the district parole officer locate appellant (Tr. 91). On January 10, 1950, while on parole the appellant was picked up by the Spokane Police Department on a disorderly conduct charge. He posted a bond and forfeited the same the following day (Tr. 91). However, on January 11, 1950, the district parole officer in Spokane, A. J. Murphy, received a copy of the daily reports of arrest for trial made by the Spokane Police Department and in examining this list discovered the name of appellant, Ben F. Mason. He then proceeded to the Police Department to ascertain the whereabouts of Mr. Mason as he wanted to apprehend him pursuant to the instruction received from his chief parole officer. Upon ascertaining the address of appellant, he and Officer Lampeer of the Spokane Police Department, went to the appellant's place of abode, notified him that he was a parole violator, put him under arrest and took him to the city jail, placing a hold on him. Later he was transferred to the county jail and while in the county jail the appellant's landlady, to whom the appellant owed rent, called Mr. Murphy and advised him that she had some belongings of the appellant which she wanted to get out of the way. Pursuant to this call, Mr. Murphy went to the St. Clair hotel and the landlady gave him a box which

contained things that belonged to Mason (Tr. 92). In examining the box he found a receipt to the Spokane hotel made out to T. R. Powers, a checkbook from the Spokane Eastern branch of Seattle First National Bank and a key to one of the local hotels. Upon calling on the hotel for which a receipt had been issued and the hotel to which the key belonged he discovered that Powers and Mason were one and the same person. Prior to this there had been certain checks issued to hotels in Spokane which apparently were forged checks and the writer of these checks had not been apprehended. However, subsequent to Mason's arrest, the appellant, Mason, and the writer of the forged checks were identified as one and the same person. The prosecuting attorney later filed an information against the appellant herein which resulted in the conviction of appellant in Spokane County on charges of having forged checks in Spokane. This the appellant had readily admitted.

ARGUMENT

The petitioner has alleged that the arrest was illegal because of some federal rule that no one has authority to issue a parole violation warrant except in strict compliance with the conditions imposed by law. I think it may be fair to assume that whatever the situation be with respect to federal parole officers, it has no relation or bearing on the procedure required of individual state parole officers.

First, in 39 Am. Jur., page 577, § 91, Pardon, Reprieve and Amnesty, in speaking of paroles it is said:

> "* * * It [parole] does not wipe out the conviction, but merely suspends its operation by remitting for the time being the confinement at hard labor, until the end of the term or an unconditional pardon is granted; the offender in the meantime is subject to prison discipline and to be taken into custody on violation of any of the conditions, as though the parole had not been granted. * * *"

It is needless to say, and the record so indicates, that Mr. Mason had a full scale hearing in the superior court of the state of Washington for Spokane county on an application for habeas corpus and a subsequent appeal to the Washington state supreme court which affirmed the trial court. Notwithstanding Mr. Mason's statement about illegal arrest in violation of the searches and seizures act, the Honorable Raymond Kelly, trial judge in the state proceedings on April 15, 1952, entered findings

of fact and conclusions of law in which he found that no constitutional right of appellant was denied him (Tr. 92). In addition, Judge Kelly in his oral opinion, speaking of the taking of the personal effects of Mr. Mason, said

> "* * * To hold otherwise, would simply mean that Mr. Murphy, having arrested the man and knowing that his personal effects were there, would have to either abandon them or wrap them all up and take them and hand them to the inmate then under arrest in a jail without any examination whatsoever. He would have been derelict in his duty if he had done that. It is my opinion that these articles and checks to which strenuous objection has been raised were, in a sense, in the effects of Mr. Ben F. Mason, petitioner herein, and not during the search and seizure, in the legal sense of the words. Mr. Murphy did not go out, in fact, he didn't have any idea at the time he picked Mr. Mason up about the four or five forged checks so there wasn't any testimony connecting Mr. Mason up with it. He had come across them when he was making an examination of Mr. Mason's effects in what I would hold to be the ordinary course of his duties and it was not only his right but his duty to do that before turning him in to the institution here for safekeeping. Now, what happened?
>
> "At that moment, at the time of arrest, it was not known to Mr. Murphy that Ben Mason had forged these checks. That developed later, and it developed as a result of an investigation upon the part of the police officers. However, I repeat, there was no use trying to minimize any possible effect that these exhibits may have had, they would have had or may have had some effect in the proof of the charges against

Mr. Mason. It is my opinion that they were merely cumulative as far as the proof of forgery is concerned. Why do I say that? Because as of January the 25th, which was some several weeks, as I recall it, before he was formally charged with this forgery, he admitted it in writing, and these exhibits, even if erroneously admitted under all the circumstances of the case are not prejudicial to the defendant, in the Court's opinion.

"And, so, being legally in custody, as I hold, the discovery of these things which were later used in evidence in connection with the forgery charges on which the defendant was convicted, was not a violation of the petitioner's constitutional rights." (Res. Ex. 1, pages 18-20.)

It would appear that what we are here dealing with is a question of evidence. In the case of *Salsburg v. Maryland*, 98 L. Ed. 281, 346 U. S. 545, 74 S. Ct. 280, the defendant had been convicted in a state court of certain gambling misdemeanors after admission of evidence which was conceded to have been obtained by an illegal search and seizure. He sought a reversal of this conviction on the ground that the statute under which the evidence was submitted was violative of the equal protection laws of the 14th amendment. In that case the law of Maryland was such that the county in which he was tried permitted the admission of illegally obtained evidence although other counties in the state did not and the admission of such evidence was barred by statute. The supreme court rejected the contentions of the petitioner and in affirming the conviction said:

> "* * * Rules of evidence being procedural in their nature, are peculiarly discretionary with the lawmaking authority, one of whose primary responsibilities is to prescribe procedures for enforcing its laws. * * * We do not sit as a super-legislature or a censor. 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' * * * We find little substance to appellant's claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection Clause relates to equality between persons as such rather than between areas. This was established long ago in a decision which upheld a statute of Missouri requiring that, in the City of St. Louis and four counties, appeals be made to the St. Louis Court of Appeals, whereas appeals made elsewhere in that State must be directed to the Supreme Court of Missouri. * * *"

The state of Washington has a statute on searches and seizures found in RCW 10.79.040 which reads as follows:

> "It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.
>
> "Any policeman or other peace officer violating the provisions of this section shall be guilty of a gross misdemeanor."

In addition, the state constitution follows the illegal searches and seizures provision of the United States constitution. As has been pointed out, the superior court in the trial of the habeas corpus proceeding in Spokane county specifically found that there had not been, as a matter of fact, an illegal search and seizure which constituted a violation of appellant's constitutional rights. We are concerned then with the question of due process of law, that is the process by which the state of Washington, or any other state, convicts a person accused of crime and whether or not that conviction and the processes leading up to it have been accepted and constitute fair and equal practice by our standards. The supreme court of the United States on this question stated in *Leland v. Oregon*, 343 U. S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002, that:

> "* * * In *Davis v. United States*, (US) *supra*, we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But '[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' * * * 'The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. * * * An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.' * * *"

Nothing could be clearer than this.

In speaking of the ruling of the district court the appellant has made several assignments of error and stated that the federal trial court erred in finding that there had been no perjury committed during the course of the trial. So far as this is concerned, it is felt the record speaks for itself. Regarding the question of the state using perjured testimony, even assuming this to be true, there was certainly no showing by testimony in any proceedings that the state knowingly used such testimony. However it appears that the alleged perjury was actually an error in the naming of a county in which the petitioner was alleged to have "hung some paper." Mr. Mason's contention is apparently that he did not write a bad check in Kittitas County but rather in Klickitat County. Judge Driver found that the similarity of the names of counties could very easily confuse a witness and this is clear in the record which was made by the petitioner at the time of his habeas corpus hearing in Spokane, Washington. It is worthy to note that during this habeas corpus proceeding the petitioner was represented by counsel and did have every protection during that proceeding and every right to present any question he and his counsel saw fit to present.

Appellant has in addition stated as a matter of fact that the state of Washington discriminatorily denied him an appeal *in forma pauperis*. Art. I, § 22, of the Washington State Constitution as amended by the 10th Amendment thereto, provides that one

of the rights of an accused criminal is the "right to appeal in all cases." RCW 2.32.240 provides in part as follows:

> " * * * *Provided*, That when the defendant in any criminal case presents to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the county treasury as other expenses of the courts are."

In the criminal proceeding in Spokane County superior court the appellant, being desirous of appealing that conviction, moved the trial court to order the county to bear the expense of the transcript of record and printing of the briefs. The trial court exercising its discretion denied the motion. The appellant is contending that his constitutional rights are thereby *ipso facto* violated. In the oral opinion of the Honorable Raymond F. Kelly in the habeas corpus case (Resp. Exh. 1), he commented on this and stated as follows:

> " * * * He then asked for a statement of facts and transcript of the record *in forma pauperis* asking that the state pay the expense of his appeal so that he could present this matter in the course of an ordinary appeal to the supreme court. It was in connection with that that he asked for the state to pay the expense and it was during that proceeding, as I recall, that Mr. Mason made statements substantially the same as he testifies to here in open court and in which he has been corroborated by other

documentary evidence entered here today. He told the court at that time that he had forged these checks but he was critical because he thought the prosecuting attorney had made some kind of deal also with him or an agreement, and also that the people to whom he had given these checks or the firms to whom he had given these checks had indicated that he would be given an opportunity to pay them back, so that he was standing there before the court in virtually the same position that he is now telling the court 'Yes, I committed these forgeries, but the State of Washington has not properly proven that I have committed them. A request for a record *in forma pauperis* is addressed to the sound discretion of the Court at least, in the ordinary appellate procedure and the discretion is to be exercised according to this standard, as I recall the statute; the Court grants the request if, in his opinion, the ends of justice will be thereby served. I think Mr. Mason should know at this time that I didn't feel in view of his remarks, in accordance with his request at that time, that I didn't feel that it would be in the ends of justice to accord him a transcript to try out a purely academic question, when he told me, as he reiterated, that he forged these checks, so, I denied his petition.'

Now, we may agree that the petitioner had a constitutional right to appeal, but not at the public's expense. In *State ex rel. Bird v. Superior Court* 30 Wn. (2d) 785, the court said at page 787, in commenting on an application for appeal *in forma pauperis*:

"* * * After considering all of the facts, records, and files, respondent judge denied the petition and announced that, in his opinion, justice would not be promoted by

furnishing petitioner Bird with a free statement of facts, to be made by the official reporter and payment therefor to be made by the county treasurer. The court expressed the conviction that Bird had been accorded a fair and impartial trial, in which no grave or prejudicial errors had occurred.

"* * * * * * * *

"* * * we are committed to the rule that the constitutional provision under which a person convicted of crime is given the right to appeal, does not include the right to require the county to defray the cost of a transcript on appeal in the case of an impecunious defendant. In *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 1 P. (2d) 331 (all of the authorities are reviewed therein), which has never been modified, we held that the statute (Rem. Comp. Stat., § 42-5, now Rem. Supp. 1943, § 42-5) which authorizes the trial judge, upon satisfactory proof of inability to pay, to order a transcript if, in his opinion, justice will thereby be promoted, vests the matter in the discretion of the trial judge. * * *"

As evidenced by the transcript of Judge Kelly's opinion, he stated that in the application for appeal in the original proceeding, he did exercise his discretion and did not see that justice would be promoted by granting the petitioner a statement of facts free of charge.

The cases which petitioner cites in support of his claim of denial of equal protection clearly do not support his claim. The case of *Dowd v. Cook*, 340 U. S. 206, was a case in which the warden of the penitentiary, in which the petitioner was incarcerated, had physically restrained him from mail-

ing out a notice of appeal. The only thing that was denied Mason was a free transcript. There is nothing in our constitution or laws which require that any defendant be given a free transcript. The petitioner was clearly not denied a right to appeal by the state of Washington.

CONCLUSION

It is respectfully submitted that appellant has had his day in court. He has been accorded due process at each and every step of his original conviction and in his subsequent and post conviction remedies. He has pursued them vigorously but appellee submits that despite this vigorous prosecution of his "case" the appellant has not made out a denial of any constitutional guaranty.

Respectfully submitted,

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